WOMAN IN EARLY ROMAN LAW.

THE foundation of archaic society, or, if the expression be permitted, its legal unit, at least among all branches of the Aryan race whose histories and antiquities are known to us, was the family, and not, as in modern times, the individual. Hence it would be but natural that woman's position in law would be largely, if not wholly, determined by her position in the legal unit. And as the conception of the ancient family or, perhaps, to speak more correctly, the particular line which the conception followed, was due in a very marked degree, to the peculiar religious beliefs of early times, it is imperative that we premise our present investigation with an examination of the religion of men of even greater antiquity than the Roman of history.

The Aryans,[2] as far back in the night of ages as our gaze can penetrate, never believed that at the close of man's short earthly existence all was ended for him. They looked upon death, not as a dissolution of our being, but simply as a change of life.[3] In the belief of these primitive men, the human soul after death resided with its body in the tomb. From its living descendants it demanded sacrifices and food offerings. Each family, therefore, had its own tomb always situated near the house, so that the living could easily hold communion with the dead. The happiness of the dead depended on this proximity to the living. Though no longer of this life, they still needed the food and drink prepared for them by their pious descendants. In return, they protected the living, and gave them pure thoughts and a happy life. The failure to make the proper offerings to his ancestors was the most impious act that a man could be guilty of. The deserted dead fell from their blissful state. They became malignant demons,

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[1] The period to which this essay is confined cannot be shown by exact dates. Suffice it to say, however, that only that portion of woman's legal history is here examined, which is antecedent to the time when, in the last years of the republic, she began her memorable advance from legal nonentity to her enviable position as the decided favorite of Roman jurisprudence.

[2] The theory here advanced of the ancient religion of Italy is that of Fastel de Coulanges, as found in "La Cité antique," English translation, by Willard Small, Boston and New York, 1889, pp. 15–48.

[3] Coulanges, The Ancient City, Mr. Small's translation, p. 15.

the only object of whose spiritual existence was the torment and final destruction of their undutiful posterity. Such "negligence was nothing less than the crime of parricide, multiplied as many times as there were ancestors in the family."[1] The logical result of such a religion could be nought else than the closer union of the members of a family, and, finally, the firm establishment of the family as the unit of any subsequent political group.

There was another religious custom of those primitive times so closely linked with the worship of the dead that both, at the time they become known to history, though perhaps originally distinct (a question now impossible to determine), formed together but one religion. This was the worship of the sacred fire, which in the far interior of every Roman house burnt with an undying flame upon the family altar. This fire was to these ancient men a god, a powerful, beneficent god, whose protection they were continually beseeching. Yet the sacred fire of each household was but the special providence of its own particular family, and was sometimes called by the name of an ancestor. For in the practice of this twofold religion there were no rules common to all the families of a community or a race. The rites and ceremonies of each household were secret. The divine fire and the ancestral spirit were blended into the household gods (*Lares, Penates*). These gods protected their own worshippers, and left the stranger to the care of his own divinities. No interference on the part of the community or state, even in much later times, was ever thought of.

Of this exclusive religion of the family, the father was the high-priest. He had supreme authority in all matters pertaining to the family worship; he alone was able to perpetuate the ancestral religion, by teaching his sons the songs, rituals, and ceremonies that he had learned from his father; and on his death he too was numbered among the ancestral gods. Before the family altar women had no independent place. They took part in the ceremonies only through their fathers or husbands. Nor did they attain godship after their decease. In death, as in life, their identity was lost in that of their male relatives. And in this old religious supremacy of the man, rather than in his physical superiority, do we find the origin of woman's political and legal subordination, so characteristic of all, or nearly all, Aryan races.

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[1] Coulanges, *ubi supra*, p. 43.

These primitive men had no conception of creation; to them generation was the transcendent mystery of life. In their belief the male alone possessed the power of reproduction. "The generator appeared to them to be a divine being, and they adored their [male] ancestor."[1]

The law accepted this supremacy of the father because no other conception of the paternal position could have been possible to believers in this old religion. From his position as high-priest of the family worship came that life-long authority over the other members of his household bestowed by this archaic society upon the father, — that authority which, known in Roman jurisprudence as *Patria Potestas*, is in its effects the most far-reaching subject of the early private law of Rome.

In ancient times, the father's control over his children, *i. e.* the *patria potestas*, was probably so nearly assimilated to the power of the master over the slave that it would be difficult to say wherein a child's position was superior to a slave's. "The heir, as long as he is a child, differeth nothing from a slave, though he be lord of all."[2] However, when history first reveals to us the practical exercise of this power, there had evidently been some modification of pristine severity. Rome's public law (*jus publicum*) took no notice whatever of the father's *potestas*. A son under power could hold any office in the state, and could, as *judex*, even pass judgment on his father's contracts, and punish his delinquencies. On the other hand, in the domain of private law (*jus privatum*) the authority of the father continued undiminished during the whole period of the republic, and for many years of the empire. At the birth of a child, the father was the sole judge of its legitimacy. He could expose the new-born babe or condemn to death the full-grown son. His was the right to emancipate or adopt a child. He could sell his own flesh and blood to another; though herein the son's plight is seen to have been better than the slave's; for when sold to a Roman citizen the son retained his freedom as to public rights, and only his labor or its fruits could be claimed by his purchaser. On the other hand, the son was as incapable of possessing, and therefore of transmitting, title to any property, as the slave; and though he could acquire legal rights, everything the child under power acquired at once became the property of his father. No action whatever could lie between father and son,

[1] Coulanges, *ubi supra*, p. 45.

[2] Galatians, iv, 1.

as the jurists held that their legal identity was so complete as to render such a proceeding equivalent to the father suing himself. For the same reason, contracts between them were impossible. An injury done the son was done the father, who alone could bring suit for the proper damages. The father, was, however, responsible for his son's torts; but he could escape the legal penalties in such cases by surrendering the person of the wrong-doer to the complainant.[1]

Thus, we see that the authority of the father over the son was in nowise constrained by law. What few checks there were, were imposed by religion. A man who sold his married son was given over to the infernal gods. When a father contemplated the death of a child, he was required to summon a council of its blood relatives, maternal as well as paternal, to whom he was to submit the question of the child's death. But the power of this council was merely advisory. If the father had the hardihood to brave public opinion and to defy religious excommunication, he could in no way be prevented from even the severest exercise of his paternal power.

We have given this somewhat lengthy exposition of the *patria potestas*, and the son's place under it, because from the status of the son we have already learned, to a great extent, the condition of the daughter. For, as long as the *paterfamilias* lived, whatever difference there was in the conditions of the son and daughter, as far as their private rights were concerned, was entirely in favor of the son. The unmarried daughter, like the son, was entirely at the disposal of the father, who could sell her or condemn her to death; and while an early law prohibited altogether the exposure of male infants, except in cases of deformity, the only restriction placed upon the exposure of female infants was the rule that the father should rear at least his first-born daughter. Custom in some respects was favorable to girls, as it was early looked upon as a most barbarous and inhuman act to make a noxal surrender of a daughter. And in the inheritance of her father's estate the daughter took an equal share with the son, provided she had not by marriage left her father's family.

On the other hand, the public law of Rome did not recognize woman at all. Women were answerable for their misdeeds to the family judge, the father or husband, as is proven by Livy's account

[1] In Roman law, *noxae deditio* (noxal surrender).

of the suppression of the worship of Bacchus at Rome.[1] In this case the men were punished by the state, but the women had to be given over to the private jurisdiction of the family. A passage from Gaius also well illustrates the complete ignoring of women by the public law of Rome. "It should be noted," says he, "that nothing can be granted in the way of justice to those under power, *i. e.* to slaves, children, and wives. For it is reasonable to conclude that, since these persons can own no property, they are incompetent to claim anything in point of law."[2] So we find that women were ineligible as witnesses in court.

Another disability arising from their non-recognition by the public law of Rome, was their inability to make wills. In the early days of Rome a will could be made only in one of two ways: either by an oral declaration, when, on the eve of battle, the legion was drawn up in line (*in procinctu*), in readiness to march to the field; or by publication in an assembly called the *comitia calata*, whose assent was necessary to the validity of the will. It is quite obvious that the first method was impossible for a woman; while it will be equally plain that she was unable to publish a will in the *comitia*, when we learn that women had no place in that assembly, none but heads of households, Roman citizens, being there admitted.

When she reached the age of seven years, the Roman maiden could be betrothed by her father to the man of his choice; and the law by a pleasant fiction supposed that the intended groom was her choice also. For it was a lasting principle of Roman law that not only *connubium* (right of intermarriage), but also consent, were necessary to a valid tying of the nuptial knot. The term "consent" here included not only the woman's consent but his also in whose power she was. By holding, however, that a daughter was entirely subject to her father's will, the necessity of her consent was made merely nominal. And although, at this period, such an eminently just principle of law seems to have been a mere mockery, yet in the latter years of the republic, and during the empire, it was of great importance to women in their struggle for equal rights.

Whether in early Rome suit could be brought for the non-performance of a marriage contract, is not now known, although a passage from Sulpicius Rufus,[3] an eminent jurist who flourished

[1] Book XXXIX., ch. 18. [2] Gaius II., 96.

[3] Preserved by Gellius; see Smith, Dictionary of Greek and Roman Antiquities, article, Matrimonium, by Geo. Long.

about 700 A. U. C., shows conclusively that, in his time, at least, such a contract was actionable.

Upon the marriage of a daughter, the father's power over her was merely transferred to the husband. It was then called *manus*, and could arise only from a marriage sanctioned by law (*justum matrimonium*). Under the kings, and during the earliest days of the republic, there was but one form of marriage in which the patrician, then the only Roman citizen, would permit himself to take part. This was the marriage sanctioned by the old religion already spoken of. It was called *Confarreatio*. It took place in presence of the *pontifex maximus*, and of ten witnesses, probably representative of the ten *curiæ* or wards of ancient Rome. In the words of Gaius, it was "a ceremony in which they used a cake of spelt (*farreus panis*), whence the name is derived, and various acts are required to be done with a traditional form of words."[1] It was entirely a matter of religion; and, doubtless, in the belief of the devotees of that ancient ancestral worship, it was the only ceremony by which the wife could be initiated into the mysteries of the family altar, and bear children to perpetuate the race, to keep alive the sacred fire, and to make prayers and offerings to the ancestral dead.

Another form of marriage, at first probably peculiar to the plebeians, was also recognized by the law as capable of conferring *manus* over the wife, and *potestas* over the children, though, most likely, not until after the passage of the Lex Camuleia, in the year 308 A. U. C., repealing that enactment of the Twelve Tables[2] which forbade marriage between a patrician and a plebeian. This marriage was called *Cœmptio*, defined by Gaius as "an imaginary sale, in the presence of at least five witnesses, Roman citizens above the age of puberty, besides a balance-holder."[3] In its origin it was, undoubtedly, not an imaginary sale but a real one.

Still another form of marriage, or more properly, another method of conferring on the husband power over his wife and children, was that peculiar acquisition — it can hardly be called ceremony, for there was but little ceremony about it — of the wife known as *usus*. The husband, after a year of continuous cohabitation, acquired over his wife all marital powers. In other words, the husband gained the ownership of the wife by prescription, just as he would have done in the case of any movable chattel by the

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[1] Gaius I., 112. [2] Table XI. [3] Gaius I., 113.

undisturbed possession thereof for one year. The Twelve Tables, however, raised the wife so far above the chattel as to permit her, by absence from her husband's house for three consecutive nights each year, to defeat the *usus*,[1] and thus paved the way for the subsequent, gradual, yet steady amelioration of woman's place in law. Yet it is almost incredible that, among a people who used the highest form of marriage known to antiquity, there should also arise a form of union fit only for barbarians of the lowest type. Stranger still, within the lowest form were the germs of a better and brighter future for woman. The immediate results, however, of the higher forms of marriage were the same as those of the lower one of ownership by prescription. This anomaly of a high conception of the sacredness of the marriage tie, as illustrated by the *Confarreatio* ceremony, joined to such a low conception of the wife's legal rights, to which conception was due the two lower forms of marriage, can be explained only by those peculiar religious beliefs of the primitive Italians to which we have so often adverted. For had the husband's superior physical strength, as is often urged, and not his religious supremacy, been the cause of this unlimited control over the wife's person, the latter would have been looked upon simply as a slave to be used merely for the gratification of the master's pleasures. Far otherwise, however, was the Roman wife. She was the means by which the religion was to be kept alive; and, as we shall hereafter see, her social position was far better and happier than her legal rights, or her want of legal rights, would lead us to expect.

Upon marriage, the wife, as we have intimated, was entirely freed from her father's control. But she merely exchanged one master for another. She passed into her husband's *manus* or, if he were *in potestate*, under the same control as he himself was. She was as incapable of performing a legal act as an inanimate object, with the single exception that, upon her husband's death, she inherited his estate equally with her children. But this advantage was offset by the fact that she was incapable of inheriting anything from her father. Indeed she was no longer regarded as a relative of her blood father; but was considered as much a member of her husband's family as if she had been born in it. All her own property, which, at this early date, was doubtless very little, vested absolutely in her husband, and upon the dissolution of the mar-

[1] Table VI.

riage there was no way in which she could recover it. Everything that she acquired during coverture, also, of course, became the property of her husband. In short, as the jurists expressed it, she stood to her husband in place of a daughter (*loco filiae*). All his powers over her were acquired not as husband but as father. Nor is there any doubt that, in the earliest times, the authority of the man over his wife was as unlimited as his authority over his slaves or children. But great restrictions are said to have been placed upon the capricious exercise of this fearful power, even in legendary times. Romulus is credited with having forbidden the killing of a wife except for adultery or wine-drinking. He is also said to have enacted the law that whoever sold his wife should be given over to the infernal gods; and if a wife were divorced on no just grounds, her ungrateful spouse's property was forfeit, one half to Ceres, and one half to his wife or her family. But a fragment of Cato the Censor shows what a terrible power was still wielded over the wife, even in historical times: "The husband is the judge of his wife. If she has committed a fault, he punishes her; if she has drunk wine, he condemns her; if she has been guilty of adultery, he kills her."[1] In the same fragment this perfect type of the early Romans says: "If you were to catch your wife in adultery, you would kill her with impunity without trial; but if she were to catch you, she would not dare to lay a finger upon you, and indeed she has no right."

Just as, in the opinion of the Roman jurist, consent was the essential ingredient of the marriage contract, so he considered consent necessary also for the continuance of the nuptial state, and all that was needed by him for its dissolution was an expression of such a desire by one of the contracting parties. And it was not until centuries after the fall of the republic that the law ever in any way regulated divorce. It is true that even in the earliest times a ceremony was necessary to dissolve the confarreate marriage; but this necessity was prescribed by religion and not by the civil law. Such dissolution of the marriage state was called *Diffarreatio*, and was the opposite process to *Confarreatio*. The cake was rejected in the presence of a priest and witnesses, and, instead of prayers, curses, spiteful and terrible, were pronounced by the quondam husband and wife.

The marriage by *Coemptio* was dissolved by *Remancipatio*, which

[1] Fragment "De dote;" see Cato, his Quae Extant, H. Jordan, editor, Leipsic, 1860, p. 68.

was nothing more than a resale of the wife to her father, or some other male relative.

But it is in the form of dissolving the marriage by *usus* that we find the real origin of the peculiar Roman laxity in regard to divorce. Here all that was necessary was simply an expression of a desire or command by the husband that the wife should no longer dwell in his house. At the time of which we are now speaking in the dissolution of the *usus* marriage, as well as in the dissolution of the two higher forms of union, it is obvious that the wife was utterly powerless to make any resistance to a divorce pronounced by her husband, or on her side to repudiate him.[1] The theory of *manus* or marital power of the husband precluded all such privilege on the wife's part. For many centuries, however, the Romans seldom or never took advantage of the unjust privilege thus permitted them by law; perhaps because the woman was so completely under subjection that no excuse was ever offered for its exercise. As a proof of the statement that divorces very unfrequently, if ever, occurred, the old tradition that Spurius Carrilius Ruga, in the year 523 A. U. C., was the first Roman to divorce his wife, is confidently offered. For even if this story be an exaggeration, or even an untruth, the fact that it was believed by the writers of a few generations after Ruga shows that divorce must have been seldom resorted to in the early days of the republic. A further proof is the unpopularity which Ruga is said to have acquired by his act. The exercise of an undoubted legal right does not often render a man unpopular, unless by such exercise he unfortunately happen to oppose some popular prejudice. Had it been aught else but an innovation, and one, too, condemned by the public conscience, excuses would surely have been offered for the exercise of a power which later became so congenial to the Romans, who afterwards showed astonishing leniency in judging subsequent Rugas.

We must now retrace our steps and renew our acquaintance with the Roman maiden, who, in striking contrast to her unmarried English and American sisters, was subject to the same disabilities as the wife.

Upon the death of the father a great change occurred in the respective conditions of son and daughter. During the life of the parent, the son's rights were merely in abeyance. Upon the death

[1] "When a man makes a divorce, he, not the censor, is the woman's judge." Cato, Fragment "De dote," Jordan's edition, p. 68.

of the head of a family, its male members themselves became *patresfamilias*, and succeeded to that power hitherto wielded by their father. Even in the lifetime of the parent independence was possible for the son. His father was able to emancipate him; thereby, it is true, the son lost all legal relationship to the family which had hitherto claimed him as a member. But, in return for this loss, he became *sui juris*, as the Roman lawyers expressed it; that is, independent of all authority save the state's. No such emancipation, either in her father's lifetime or after his death, ever fell to a woman's lot. In this respect, a slave was more fortunate, for freedom was possible for him. Even the full-grown woman was subject to the same restraint as a boy that had not yet reached the age of puberty. Whether single or married, the death of father or husband made no difference in a woman's legal position. It was utterly impossible for either husband or father to emancipate wife or daughter, no matter how intensely he might have longed to do so. For, if at her father's death no provision was made by testament for the female child's guardianship, the law supplied her with guardians. The same rule held when a husband's testament failed to provide guardians for his wife. In the ancient Roman law, women were always children; this condition being called by the jurist the perpetual tutelage of woman. "A sex created to please and obey," to quote the words of Gibbon,[1] "was never supposed to have attained the age of reason and experience." In this life-long bondage of woman do we find further testimony of the overwhelming importance of the family in ancient society. This peculiar contrivance of archaic jurisprudence to keep a woman in the bondage of her family for life is obviously but an artificial prolongation of that most important factor of the primitive family, the *patria potestas*, when for other purposes it has been dissolved.[2] This intimate connection between the guardianship of woman and family law is very plainly seen, if it be noticed upon what persons the law threw the tutelage of women. For, since the maiden succeeded to a share of her father's estate, at his death, the nearest male relatives of the deceased, in case the latter himself had made no appointment by testament, became her legal guardians. While, if married, since the wife succeeded to a share of her husband's property upon his decease, the latter's nearest male relatives were called by law to the wife's guardian-

[1] Decline and Fall, ch. 44.

[2] Maine, Ancient Law, New York, 1878, pp. 147–148.

ship, in default of appointment by will. The object of all this cannot escape our attention. The guardians would see to it that the property of the maid or widow did not pass out of their respective families. Although this law gradually fell into disuse in the closing years of the republic and during the empire, there is no doubt that, at the time of which we write, it existed in all its disagreeable severity. A woman could alienate none of her property, nor enter into any kind of contract, not even that of marriage, without the consent of her guardians. "Her inheritance, therefore, was hers in name only; in reality, it was in the hands of her guardians."[1] In the language of Livy:[2] "To every act, even of a private character, done by a woman, our ancestors required the sanction of a guardian." Even with this sanction she could not make a will or emancipate a child. The first, as has been stated, was a public act, and a woman was absolutely unknown to the public law. She could not emancipate, because, as she herself was never free from control, it was impossible for her to have a child under power, either by birth or adoption, whom she could make *sui juris*.

To this almost universal nonentity of woman in law there was one surprising exception. The Vestal Virgins enjoyed great and exceptional privileges. Upon their induction to office, they were immediately freed from all paternal control. They could be witnesses in a court of justice, where no oath was required of them. If a criminal, on his way to execution, chanced to meet a Vestal, he was immediately set free. They also enjoyed many other high privileges, which, in spite of the fact that they could never marry, must have made it very desirable for a Roman maiden to become a priestess of Vesta.

It is quite a relief, after an examination of woman's legal position in these bygone days, to turn our attention to the private life of the Romans, and learn how the gentler sex were treated socially. Here do we find another proof of the great superiority of the Roman race to other nations of antiquity in all that affects the welfare of society and the progress of government. Woman's place in the private life of even the earliest Romans was very high. She was not confined to her apartments, as in Hellas, but was permitted to mingle freely with her husband's guests. She could

[1] Muirhead, Historical Introduction to the Private Law of Rome, Edinburgh, 1886, pp. 44–45.

[2] Book XXXIV., ch. 2.

walk in public whenever so disposed, and could even attend the theatres. In our eyes these seem very trivial privileges; but if we call to mind the absurd restrictions placed upon the movements of Greek and other women of antiquity, we must confess that these trifling concessions were a great stride towards that perfect equality of the sexes finally reached in Rome. As Becker truly says: [1] "The Roman housewife always appears as the mistress of the household economy, and guardian of the honor of the house, equally esteemed with the *paterfamilias* in and out the house." The most important part of the Roman dwelling, the *atrium*, was given up to the matron. There she managed the household and ruled her female servants; and, in the houses of the upper classes, she performed no menial labor, for which work the wealthier Roman householder always provided slaves. To such a high respect for woman socially, together with the high conception of marriage, shown by the confarreate marriage, is due that continual progress of woman in historical times to a higher legal place, — that progress which is the pleasure of every student of Roman law and custom to trace.

John Andrew Couch.

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[1] Gallus, translated by Rev. Frederick Metcalf, London, 1853, p. 153.